

PUBLIC MATTER – DESIGNATED FOR PUBLICATION

FILED May 28, 2004

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of)	00-O-12253
)	
ALVIN GILBERT TENNER,)	
)	
A Member of the State Bar.)	OPINION AND ORDER
)	ON REVIEW

The State Bar requests review of a decision recommending that respondent Alvin Gilbert Tenner be actually suspended from the practice of law for two years. Respondent did not file responses to the notices of disciplinary charges in this proceeding and his default was entered. He was found culpable of 21 counts of misconduct involving four client matters. The misconduct included the failure to perform legal services competently, failure to communicate, improper withdrawal, failure to release client files, failure to maintain respect for the courts, failure to report judicial sanctions, failure to cooperate with the State Bar, failure to return unearned fees, and conduct involving moral turpitude.

Respondent was admitted to the practice of law in 1965, was disbarred in 1986, and was reinstated to the practice of law in 1992. The misconduct in the present case occurred between 1998 and 2001. The State Bar argues on review that respondent should be disbarred for a second time. We have independently reviewed the record (Cal. Rules of Court, rule 951.5; Rules Proc. of State Bar, rule 305(a); *In re Morse* (1995) 11 Cal.4th 184, 207), and we agree.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

The State Bar does not contest the hearing judge's findings of fact and conclusions of law. Based on our independent review of the record, we adopt them, and briefly summarize them as follows:

A. The Sampo Matter

In November 1997, Tony Sampo employed respondent to represent him in a civil action against an auto dealer and a bank. Respondent received \$1,000 as a non-refundable retainer with the remaining fees to be paid out of any settlement or award received in the case. In September 1998, respondent filed a lawsuit on behalf of Sampo against the defendants. A trial date in September 1999 was eventually set.

In July 1999, the defendants filed and served on respondent motions for summary judgment. Respondent did not file any opposition to the motions or appear at the hearing. The motions were granted and the trial date was vacated.

Copies of the proposed summary judgments were served on respondent, but he did not respond. Respondent was served with notices of entry of judgment, but took no action to set aside the judgments within the six-month period permitted by statute.

In September 1999, the defendants filed and served on respondent memoranda of costs and attorney fees. Respondent did not file an opposition or appear at the hearing. The court awarded costs and fees totaling \$28,610. Respondent was served with the court's ruling, but took no action.

Respondent did not inform Sampo that summary judgments were granted, that the trial date was vacated and that Sampo was liable to the defendants for the payment of costs and attorney fees. In September 1999, Sampo's son, Robert, telephoned respondent on behalf of Sampo to confirm the trial date. Respondent told Robert that the trial had been continued and a new date had not been set. In October 1999, respondent told Robert that the trial had been rescheduled by the judge to April 2000.

In November 1999, Sampo received notice that an abstract of judgment had been filed against his property. Robert contacted respondent on behalf of his father. Respondent told Robert that he was unaware of a judgment and that he would check into the matter and get back to him. In the following two months, Robert made numerous attempts to contact respondent by telephone and letter. Respondent did not return Robert's calls or otherwise communicate with Sampo or Robert.

When respondent did not respond to Sampo's inquiries, Sampo hired attorney Vic Rodriguez (Rodriguez) to assist him in determining what had occurred. In early February 2000, Rodriguez wrote to respondent, advising him to immediately file a motion to set aside the judgments or else Rodriguez would do so and seek costs and sanctions against respondent. Respondent delayed until the end of February 2000 to file the motion. The court denied the motion.

Rodriguez thereafter filed a motion to vacate the judgments based upon respondent's misconduct. Rodriguez notified respondent by mail to appear at the hearing on the matter and requested that respondent immediately file oppositions to the summary judgment motions. Respondent did not file the oppositions, nor did he appear at the hearing.

In March 2000, the court granted the motion and set aside the judgments. Due to respondent's failure to appear at the hearing, the court dismissed respondent as Sampo's attorney and substituted Rodriguez in his place. The court also ordered respondent to pay \$3,500 to the bank and \$1,400 to the auto dealer for their attorneys' fees.

In April 2000, Rodriguez requested that respondent return Sampo's file. Thereafter, Rodriguez made additional requests for the file, but to no avail.

Respondent did not comply with the court's order to pay the attorneys' fees. The auto dealer filed an application for issuance of an order to show cause against respondent, which was set for hearing in August 2000. Respondent did not appear at the hearing nor did he pay the attorneys' fees, resulting in the court's issuance of an order for respondent to appear in September

2000. Respondent was served with the court's order. Respondent did not appear at the hearing and the court ordered respondent to pay the auto dealer's counsel additional fees of \$1,103 and sanctions of \$1,000. The court also issued an attachment for defaulter. Four days latter respondent appeared in court, the attachment was recalled, and the sanctions were increased to \$1,500. At no time did respondent notify the court that he would not appear at the scheduled court hearings. Respondent did not report the sanctions imposed against him to the State Bar of California.

On September 7, October 13, and October 26, 2000, and August 8, 2001, a State Bar investigator wrote to respondent regarding the Sampo matter and requested a written reply. Although respondent contacted the State Bar and sought additional time to respond to the letters, he never did.

The hearing judge concluded that respondent was culpable of: (1) failing to perform legal services competently in violation of rule 3-110(A) of the Rules of Professional Conduct¹ by failing to respond to the summary judgment motions and cost memoranda or appear at numerous court hearings; (2) failing to communicate with his client in violation of section 6068, subdivision (m), of the Business and Professions Code² by failing to inform Sampo that the defendants obtained summary judgments against Sampo, that Sampo's trial had been vacated, and that Sampo was liable for the payment of costs and attorney fees, and by failing to return Robert's numerous telephone calls; (3) improperly withdrawing from employment in violation of rule 3-700(A)(2) by, in effect, withdrawing from Sampo's case in or about July 1999 when he ceased responding to motions filed against his client and attending court hearings in the matter; (4) failing to promptly return his client's file in violation of rule 3-700(D)(1) by failing to return Sampo's file as requested; (5) failing to maintain the respect due to the courts in violation of section 6068, subdivision (b), by repeatedly failing to appear at numerous court hearings and by

¹ All further references to rules are to these Rules unless otherwise noted.

²All further references to sections are to this Code unless otherwise noted.

failing to comply with various court orders requiring respondent to reimburse the defendants' fees; (6) failing to obey a court order in violation of section 6103 by failing to comply with the court orders to pay fees to the defendants and by failing to appear at the order to show cause hearings; (7) engaging in acts of moral turpitude in violation of section 6106 by misrepresenting to Sampo and Robert that the trial in the matter had been continued when in fact it was vacated, and by denying that he had any knowledge of the summary judgments against Sampo; (8) failing to report sanctions in violation of section 6068, subdivision (o)(3), by failing to report to the State Bar the \$1,500 sanctions imposed against him; and (9) failing to cooperate with the State Bar in violation of section 6068, subdivision (i), by failing to respond to the State Bar's four letters or participate in the investigation of the Sampo matter.

B. The Sirney Matter

In March 1997, Jon and Nancy Sirney hired respondent to prepare an action in a civil case. Respondent filed a complaint in July 1998, but did not perform discovery or prosecute the matter further. In November 1998, the court issued an order to show cause for the failure to prosecute the case. Respondent did not appear at the hearing and the court dismissed the case. Respondent was later able to have the case reinstated. In December 1998, the defendant filed a motion to strike and a demurrer to the complaint. Respondent filed an opposition to the demurrer, but did not cite any case law or authorities. The demurrer was granted with prejudice in April 1999.

During the time he represented the Sirneys, respondent communicated with them on only two occasions. In February and June 1998, respondent sent the Sirneys drafts of the complaint he proposed to file. Respondent never advised the Sirneys that the demurrer was granted or that their complaint was dismissed.

The hearing judge concluded that respondent was culpable of: (1) failing to perform legal services competently in violation of rule 3-110(A) by failing to conduct discovery or pursue the Sirneys' case and by failing to cite any case law or authorities to support his opposition to the

demurrer; and (2) failing to communicate with his client in violation of section 6068, subdivision (m), by failing to advise his clients of the demurrer and dismissal.

C. The Baker Matter

In April 1998, Eugenia Baker hired respondent to represent her in a civil matter. Baker paid Respondent \$1,000 as a non-refundable retainer. In April 1999, respondent filed a complaint and continued to perform services for Baker until October 1999, when the defendants filed cross-complaints against Baker. Respondent did not file any response to the cross-complaints and did not cooperate with the discovery proceedings. In February 2000, the court issued an order compelling discovery. Respondent did not comply with the discovery order nor inform Baker of the order. The court dismissed Baker's complaint and entered default judgments against Baker in the sum of \$61,512 in June and July 2000.

In March 2001, respondent advised Baker that the complaint had been dismissed and that he would take action to set aside the default judgments; but he did not do so, nor did he ever tell her the amount of the default judgments that had been entered against her. In March 2001, Baker requested the return of her file, but respondent failed to do so.

In July and August 2001, a State Bar investigator wrote to respondent regarding the Baker matter and requested a written reply. The State Bar requested the same during telephone conversations with respondent on four separate occasions in August and November 2001, and March 2002. Respondent acknowledged receiving the State Bar's letters and promised that he would send a response, but he never did.

The hearing judge found respondent culpable of: (1) failing to perform legal services competently in violation of rule 3-110(A) by failing to respond to the cross-complaints, failing to cooperate with discovery and failing to set aside the default judgments; (2) failing to communicate with his client in violation of section 6068, subdivision (m), by failing to inform his client that discovery was ordered, that the complaint was dismissed and that default judgments had been entered against her; (3) failing to promptly return his client's file in violation

of rule 3-700(D)(1) by failing to return Baker's file as requested by Baker; and (4) failing to cooperate with the State Bar in violation of section 6068, subdivision (i), by failing to reply to the State Bar's investigatory letters or participate in the investigation of the matter.

D. The Chapin Matter

In June 1998, Kathleen Chapin hired respondent to represent her in a civil action. Chapin paid respondent \$300 as a retainer. Respondent did not perform any services on her behalf. Chapin telephoned respondent on numerous occasions to inquire about the status of her case. Respondent did not return her telephone calls. In March 2000, Chapin requested the return of the unearned fees and her file so that she could hire new counsel. She repeated her request in August 2000. Respondent did not return her file or fees.

In June and August 2000, a State Bar investigator requested that respondent file a written response to Chapin's complaint. In September 2000, respondent contacted the State Bar, acknowledged receipt of the letters and promised to respond within a week. The State Bar requested that respondent file a reply on three separate occasions. Finally, in May 2001, respondent filed a response.

The hearing judge concluded that respondent was culpable of: (1) failing to perform legal services competently in violation of rule 3-110(A) by failing to perform any services for which he was employed; (2) failing to communicate with his client in violation of section 6068, subdivision (m), by failing to respond to Chapin's numerous calls; (3) improperly withdrawing from employment in violation of rule 3-700(A)(2) by, in effect, withdrawing from the case when he ceased to provide services to Chapin; (4) failing to return unearned fees in violation of rule 3-700(D)(2) by failing to return Chapin's retainer; (5) failing to return his client's file in violation of rule 3-700(D)(1) by failing to return Chapin's file upon her request; and (6) failing to cooperate with the State Bar in violation of section 6068, subdivision (i), by failing to timely reply to State Bar's investigatory inquiries.

E. Mitigating and Aggravating Circumstances

No mitigating factors were found in this default proceeding. In aggravation, the hearing judge found that respondent had a record of prior discipline. (Std. 1.2(b)(i), Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct [hereafter “stds.”].) In *Tenner v. State Bar* (1978) 20 Cal.3d 878, respondent was suspended for three years, stayed, and placed on probation for three years, for client abandonment and misrepresentation. In *Tenner v. State Bar* (1980) 28 Cal.3d 202, respondent was suspended for four years, stayed, and placed on probation for four years for misappropriation, misrepresentation and forgery. In Bar Misc. 4835, filed December 19, 1984, respondent was suspended for five years, stayed, and placed on probation for five years with three years actual suspension for failure to pay client funds and commingling in 1982. In Bar Misc. 5104, filed April 16, 1986, respondent was disbarred for endorsement of checks without consent and acts of moral turpitude.

The hearing judge concluded, however, that the aggravating weight of this prior discipline should be diminished because the misconduct underlying the prior discipline occurred in the 1970's and early 1980's and therefore was remote in time, and because the prior discipline had already been considered as aggravation in respondent's prior discipline cases.

Other aggravating circumstances found by the hearing judge were that respondent committed multiple acts of wrongdoing (std. 1.2(b)(ii)); significantly harmed his clients (std. 1.2(b)(iv)); demonstrated indifference toward rectification of or atonement for the consequences of his misconduct (std. 1.2(b)(v)); and failed to participate in this disciplinary matter before the entry of his default (std. 1.2(b)(vi)).

DISCUSSION

The State Bar advances several arguments on review in support of its assertion that respondent should be disbarred. Chief among them is its argument that, in view of respondent's past and present misconduct, disbarment is warranted. We agree.³

Respondent's first prior disciplinary matter involved misconduct in three client matters. In each matter, respondent was hired to represent the client in a civil matter and then failed to perform the services for which he was hired. In one of the cases, respondent failed to appear at numerous court hearings, which resulted in the dismissal of the case, and in another, respondent failed to file an answer for his client which resulted in a default judgment against his client. Further, respondent failed to communicate in all three matters and made misrepresentations to the clients in two of the cases and to the State Bar regarding one. The misconduct occurred between 1972 and 1975. Effective in April 1978, respondent was suspended for three years, stayed, and placed on probation for three years. Respondent asserted that his alcoholism affected him and the Supreme Court imposed probation conditions to address that condition. (*Tenner v. State Bar*, *supra*, 20 Cal.3d 878.)

In his second prior disciplinary matter, respondent settled his clients' tort case in one matter, received a settlement draft of \$8,000, forged his clients' signatures, negotiated the draft, and thereafter misappropriated a substantial part of the money. For four years thereafter, respondent misrepresented the status of the case to the clients, and after the clients found out that the case had settled, falsely accused another attorney of forging the check. In another group of matters, respondent represented six clients in civil matters, each of whom had executed medical

³ As we find this issue dispositive, we do not address the State Bar's remaining contentions. We note, however, that we find no support for the hearing judge's conclusion that the weight of respondent's prior discipline should be diminished. Although the prior discipline was remote in time it was serious in nature (*In the Matter of Hanson* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 703, 713), and respondent's prior discipline may properly be considered in circumstances such as the present where an attorney has been disbarred, reinstated, and committed further misconduct (*Eschwig v. State Bar* (1969) 1Cal.3d 8, 18-19; *Pearlin v. State Bar* (1963) 59 Cal.2d 834, 834-835).

liens, exceeding \$3,000 in the aggregate. Respondent settled the cases, withheld sums to pay the liens, failed to pay them, and misappropriated the money for his own use. The misconduct occurred in 1972-1976. Effective in November 1980, respondent was suspended for four years, stayed, and placed on probation for four years. Respondent's alcoholism was again found to be a factor. The Supreme Court observed that the misconduct "would readily warrant his disbarment" but that respondent had demonstrated strenuous rehabilitative efforts over a substantial period of time, including that he had stopped drinking. (*Tenner v. State Bar, supra*, 28 Cal.3d at p. 207.)

In his third prior disciplinary matter, respondent again settled a case, received the settlement funds, withheld \$2,840 to pay a medical lien, failed to pay the medical provider, and misappropriated the money to his own use. Respondent also misled the medical provider regarding the payment. The misconduct occurred in 1980-1982. Effective in January 1985, respondent was suspended for five years, stayed, and placed on probation for five years with three years' actual suspension. (Bar Misc. 4835, filed December 19, 1984.)

In his fourth prior disciplinary matter, respondent received five checks totaling \$2,393 which were made payable to himself and a non-client payee, signed the name of the other payee without his consent, and cashed the checks. The misconduct occurred in 1981. During oral argument to the review department in this proceeding in November 1995, respondent admitted that he had earlier misled the review department as to his rehabilitation from alcohol abuse and admitted facts showing clear violations of the terms and conditions of his prior discipline. Effective in May 1986, respondent was disbarred. (Bar Misc. 5104, filed April 16, 1986.)

In 1992, during the trial of respondent's petition for reinstatement, he admitted that he continued to drink alcohol until 1985, which was in violation of the terms of his prior disciplinary probation, and that he had failed to comply timely with rule 955 of the California

Rules of Court, which was in violation of the Supreme Court's order in his prior disciplinary matter. The rule 955 compliance was due in 1985 and not completed until 1990.⁴

Respondent was reinstated to the practice of law in July 1992. Approximately six years latter he began committing the misconduct involved in the present case.

Thus, respondent's past and present disciplinary record shows that while acting as an attorney respondent failed to perform the legal services for which he was hired in at least seven client matters, which resulted in the dismissals of his clients' cases and judgments against his clients; failed to appear on behalf of his clients at numerous court hearings; failed to communicate with his clients; misrepresented the status of his clients' cases to his clients and to the State Bar; abandoned his clients; forged signatures on checks; falsely accused another attorney of misconduct; misappropriated money belonging to his clients and to medical providers; failed to return client files; failed to return unearned fees; failed to comply with numerous court orders, including Supreme Court disciplinary orders; failed to report sanctions to the State Bar; and failed to cooperate with the State Bar.

In *Twohy v. State Bar* (1989) 48 Cal.3d 502, the attorney's past and then present record of misconduct showed that he had failed to perform services for his clients; made false representations to his clients regarding settlement of their cases; failed to communicate with his clients; failed to return unearned fees; commingled client funds; failed to return client files; failed to appear in court, which resulted in prejudice to his client; failed to comply with a court order; and failed to cooperate and participate in the State Bar disciplinary proceeding. The court found that Twohy's record showed a serious pattern of misconduct involving recurring types of wrongdoing which clearly warranted disbarment in the absence of compelling mitigating circumstances. (*Id.* at p. 513.) No such circumstances were found and Twohy was disbarred.

⁴ By request of the State Bar, we take judicial notice under Evidence Code sections 452, subdivision (d), and 459 of the State Bar Court's decision in respondent's reinstatement case, *In the Matter of Alvin G. Tenner*, case number 91-R-03842, filed April 6, 1992. We direct our Clerk to make that decision a part of the record of this proceeding.

Other cases in which an attorney's combined record of past and then present misconduct showed a similarly wide range of misdeeds involving recurring types of wrongdoing have also resulted in disbarment. (See e.g., *McMorris v. State Bar* (1983) 35 Cal.3d 77 [failure to perform legal services and failure to communicate with the clients in five client matters; four prior suspensions, which included four instances of failure to perform legal services, failure to return an advanced fee, misappropriation of \$40, and failure to comply with the Supreme Court's disciplinary order to take and pass the Professional Responsibility Examination]; *Marcus v. State Bar* (1980) 27 Cal.3d 199 [failure to use reasonable diligence on behalf of a client in one matter, and failure to perform legal services for another, with 12 similar prior acts or courses of misconduct; two suspensions from practice for other types of misconduct]; *Grove v. State Bar* (1967) 66 Cal.2d 680 [ten counts of unprofessional conduct over a period of four years, including failure to file or defend suits, retaining fees for services not performed, failure to report money collected for clients, false representation, and purposeful evasion of communication with clients; failure to appear at local administrative committee hearing; one prior suspension for nonpayment of dues and one prior reprimand]; *Schullman v. State Bar* (1976) 16 Cal.3d 631 [abandonment of clients in two instances; five prior suspensions over an eleven-year period, three for abandoning clients, one for misappropriating clients' funds, and one for appearing at legal proceedings while under suspension]; *Ridley v. State Bar* (1972) 6 Cal.3d 551 [over a four-year period, four instances of failure to perform services or return fees, two instances of failure to file or prosecute actions, and making false statements to clients and to the State Bar]; *Simmons v. State Bar* (1970) 2 Cal.3d 719 [three instances of wilful abandonment of clients resulting in harm to them; two prior suspensions for misappropriating clients' funds].)

The Supreme Court has repeatedly held that the habitual disregard by an attorney of the interests of his clients combined with the failure to communicate with such clients constitute acts of moral turpitude justifying disbarment. (*McMorris v. State Bar*, *supra*, 35 Cal.3d at p. 85, and cases cited therein.) Respondent's past and present misconduct shows an extensive and broad

range of misdeeds involving recurring types of misconduct, which we conclude demonstrate his habitual disregard for the interests of his clients and which warrant disbarment in the absence of compelling mitigating circumstances. Respondent did not participate in this proceeding and no mitigating circumstances were presented or are evident from the record before us.

We recognize that many years have passed since respondent's first discipline case. Nevertheless, it is apparent that the discipline that has been administered to respondent over the course of these many years, which included the ultimate sanction of disbarment, "did not succeed in imparting to him an understanding of the duties of an attorney to his clients and to the public." (*Bruns v. State Bar* (1941) 18 Cal.2d 667, 673; see also *Eschwig v. State Bar, supra*, 1 Cal.3d at p. 19.) Six years after being reinstated to the practice of law following his disbarment, respondent again engaged in serious wrongdoing that caused considerable harm to his clients. He repeatedly failed to file necessary documents for his clients, failed to appear at numerous scheduled hearings, failed to comply with several court orders, failed to return his clients' files and money, avoided his clients' attempts to communicate with him, and then, when he did speak to his clients, misled them as to the status of their affairs. Further, respondent failed to cooperate with the State Bar in its investigation of the present matters and failed to participate in the State Bar Court disciplinary proceedings. Under the circumstances, we believe that the risk of respondent repeating his misconduct would be considerable if he was merely, once again, suspended from the practice of law.

As the Supreme Court has held, the "purpose of a disciplinary proceeding is not punitive but to inquire into the fitness of an attorney to continue in that capacity for the protection of the public, the courts and the legal profession." (*Marcus v. State Bar, supra*, 27 Cal.3d at p. 202.) The combined record before us of respondent's past and present misconduct amply demonstrates his unfitness to continue to practice.

DISCIPLINE

We therefore recommend that respondent Alvin Gilbert Tenner be disbarred from the practice of law in this state and that his name be stricken from the roll of attorneys licensed to practice. We further recommend that he be ordered to comply with the provisions of rule 955 of the California Rules of Court and perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court's order in this matter. We further recommend that the State Bar be awarded costs pursuant to section 6086.10 of the Business and Professions Code and that such costs be payable in accordance with section 6140.7 of the Business and Professions Code.

ORDER OF INACTIVE ENROLLMENT

In view of our disbarment recommendation, it is ordered that respondent be enrolled as an inactive member of the State Bar. (Bus. & Prof. Code, § 6007, subd. (c)(4).) The inactive enrollment is effective three days after service of this opinion. (Rules Proc. of State Bar, rule 220(c).)

WATAI, J.

We concur:

EPSTEIN, J.
HONN, J.*

* Hon. Richard A. Honn, Hearing Judge, sitting by designation pursuant to rule 305(e), Rules of Procedure of the State Bar.

Case Nos. 00-O-12253; 00-O-13162; 00-O-13517; 01-O-01299 (Cons.)

In the Matter of Alvin Gilbert Tenner

Hearing Judge

JoAnn M. Remke

Counsel for the Parties

For the State Bar of California:

Allen Blumenthal
Office of the Chief Trial Counsel
The State Bar of California
180 Howard Street
San Francisco, California 94105-1639

For Respondent:

Alvin Gilbert Tenner, in pro. per.
P.O. Box 7301
Northridge, California 91327